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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

UNITED PAPERWORKERS INTERNATIONAL UNION and
UNITED PAPERWORKERS LOCAL UNION NO. 1033,

Petitioners,

v.

ROLAND BUZENIUS
and
NATIONAL LABOR RELATIONS BOARD,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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RESPONDENT ROLAND BUZENIUS' MEMORANDUM IN RESPONSE TO THE PETITION

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QUESTION PRESENTED

Does a union breach its duty of fair representation when it negotiates and maintains a compulsory unionism provision that, on its face, requires—misleadingly—that an employee be "a member of the Union," even though that requirement cannot lawfully be enforced literally as a condition of employment?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 2

I. The Facts 2

II. Proceedings Below 3

REASONS FOR DENYING THE WRIT 4

I. The Court of Appeals' Decision Was Clearly Correct Under This Court's Controlling Holdings in *General Motors* and *Beck* 4

II. The Court Should Grant Certiorari on the Issue Petitioners Present, But Not Here. Instead, the Court Should Deny This Petition and Grant the Petition in *Marquez* or, Alternatively, Grant Both the Paperworkers' Petition and the *Marquez* Petition and Summarily Affirm in This Case or Consider the Cases Together 9

A. There Is a Widespread Conflict Among the Circuits, and Within the NLRB, as to Whether NLRA Section 8(a)(3) Permits Agreements That Purport to Require "Membership" and Payment of Full Dues, Although That Section, as Definitively Interpreted by This Court, Prohibits Enforcement of Those Requirements 10

TABLE OF CONTENTS (cont.)

Page

B. The Importance of the Issue 13

C. The Entire Issue of the Validity of Compulsory Unionism Provisions in Collective Bargaining Agreements Is More Completely Presented in *Marquez* Than in This Case 13

CONCLUSION 14

TABLE OF AUTHORITIES

CASES ***Page***

ALPA v. O'Neill, 499 U.S. 65 (1991) 8

Bloom v. NLRB, 30 F.3d 1001 (8th Cir. 1994) 6, 7, 8, 10

Communications Workers v. Beck,
487 U.S. 735 (1988) ..... *passim*

Electronic Workers v. NLRB,
41 F.3d 1532 (D.C. Cir. 1994) 11

Electronic Workers Local 444 (Paramax Systems Corp.),
311 N.L.R.B. 1031 (1993), *petition for review denied*,
41 F.3d 1532 (D.C. Cir. 1994) 12, 13

Local 54, Hotel Employees & Restaurant Employees
Int'l Union (Atlantis Casino Hotel),
291 N.L.R.B. 989 (1988) 6

Marquez v. Screen Actors Guild, 124 F.3d 1034
(9th Cir. 1997), *petition for cert. filed*,
66 U.S.L.W. 3458 (U.S. Dec. 24, 1997)
(No. 97-1056) ..... *passim*

Monson Trucking, Inc.,
324 N.L.R.B. No. 149 (Oct. 31, 1997) 12

NLRB v. General Motors Corp.,
373 U.S. 734 (1963) ..... *passim*

Nielsen v. Machinists Local 2569,
94 F.3d 1107 (7th Cir. 1996) 11

Pattern Makers' League v. NLRB,
473 U.S. 95 (1985) 5, 6, 8

TABLE OF AUTHORITIES (cont.)

CASES *Page*

Radio Officers' Union v. NLRB,
347 U.S. 17 (1954) 5

Schreier v. Beverly California Corp.,
892 F. Supp. 225 (D. Minn. 1995) 7, 11

Shearson/American Express, Inc. v. McMahon,
482 U.S. 220 (1987) 5

Teamsters Local 443 (Connecticut Limousine Service),
324 N.L.R.B. No. 105 (Oct. 2, 1997) 12

Wegscheid v. Auto Workers Local 2911,
117 F.3d 986 (7th Cir. 1997) 8, 11, 12

STATUTES

National Labor Relations Act,

§ 7, 29 U.S.C. § 157 13
§ 8, 29 U.S.C. § 158 7
§ 8(a)(3), 29 U.S.C. § 158 (a)(3) ..... *passim*
§ 8(b)(1)(A), 29 U.S.C. § 158(b)(1)(A) 3, 9

MISCELLANEOUS

Wellington, *Union Fines and Workers' Rights*,
85 Yale L.J. 1022 (1976) 13

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RESPONDENT ROLAND BUZENIUS' MEMORANDUM IN RESPONSE TO THE PETITION

Respondent Roland Buzenius respectfully submits this Memorandum in response to the Petition of United Paperworkers International Union and United Paperworkers Local Union No. 1033 (hereinafter "Unions" or "Paperworkers"). Respondent Buzenius urges that the Court grant certiorari on the issue presented by Petitioners, but not in this case. Instead, this Court should deny the Petition in the case and grant the Petition in *Marquez v. Screen Actors Guild*, 124 F.3d 1034 (9th Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3458 (U.S. Dec. 24, 1997) (No. 97-1056), or, in the alternative, should grant the petitions in both this case and *Marquez* and summarily affirm in this case or consider them together.

STATEMENT OF THE CASE

This case involves the construction of section 8(a)(3) of the National Labor Relations Act ("NLRA" or "Act"), 29 U.S.C. § 158 (a)(3) (1988), insofar as it authorizes compulsory unionism requirements in collective bargaining agreements.

I. The Facts.

The Unions have a collective bargaining agreement with Weyerhaeuser Paper Company which contains a union security clause (Article 2, Section 2) that requires bargaining unit employees to become and remain members in good standing of the Unions, as a condition of employment. That clause states:

> It is agreed that all employees who are members of the Union shall remain members of the Union in good standing. All new employees, who after the completion of thirty (30) days shall become and remain members in good standing as a condition of this employment.

(Pet. App. at 24a.)

Roland Buzenius was a member of the Unions and an employee of Weyerhaeuser. On April 30, 1993, Buzenius sent letters to both the International and the Local resigning from the Unions. In those letters, he also asserted his right under *Communications Workers v. Beck*, 487 U.S. 735 (1988), to object to financially supporting the Unions' non-collective bargaining activities. (Pet. App. at 24a-25a.)

However, even after Buzenius resigned from the Unions, the Unions continued to treat him as a union member. They did not acknowledge Buzenius' resignation. (*Id.* at 25a.) Instead, the International sent him a new membership card. Additionally, the Unions never informed Buzenius of his right to pay only a reduced "financial core" fee, the amount of that fee, or any of his *Beck* rights. They failed to provide any information about the financial core fee. In the words of the Administrative Law Judge

who heard this case, the Unions "merely stonewalled." (*Id.* at 28a.)

II. Proceedings Below.

On June 23, 1993, Buzenius filed unfair labor practice charges against the Unions with the National Labor Relations Board ("NLRB"). (Pet. App. at 23a.) The NLRB's General Counsel issued a complaint against the Unions for violating Buzenius' right to pay a reduced fee and for failing to inform bargaining unit employees about their rights to refrain from union membership and pay a reduced fee in lieu of union dues. (*Id.*)

Following a trial, the Administrative Law Judge, on March 25, 1994, ruled that the compulsory unionism language was not *per se* unlawful, but that the Unions breached their duty of fair representation, in violation of section 8(b)(1)(A) of the Act, by failing to advise Buzenius and other unit employees of their rights to refrain from union membership and pay a reduced fee in lieu of union dues. The Judge required the Unions to notify each unit employee of his *Beck* rights. (Pet. App. at 32a-33a.). On December 20, 1995, the Board affirmed the Judge's order and required the Respondents to notify all bargaining unit employees of their rights under *Beck* and *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963). (Pet. App. at 15a-19a.) The Board refused Buzenius' request that it order the Unions to expunge or modify the union security clause. (*Id.* at 3a.)

Buzenius timely appealed. The United States Court of Appeals for the Sixth Circuit held that the union security agreement requiring union membership was facially invalid and that the Board's refusal to order expungement of the unlawful language from the agreement was an abuse of its discretion. (*Id.* at 12a-13a.)

REASONS FOR DENYING THE WRIT

I. The Court of Appeals' Decision Was Clearly Correct Under This Court's Controlling Holdings in *General Motors* and *Beck*.

The issue raised in the Paperworker's Petition, as restated by this Memorandum, is whether a union breaches its duty of fair representation when it negotiates and maintains a compulsory unionism provision that, on its face, requires—misleadingly—that an employee be "a member of the Union," even though that requirement cannot lawfully be enforced literally as a condition of employment. The Sixth Circuit held that:

> [b]ecause the express language of this clause is inconsistent with employees' right to refuse to join the Union or pay full dues, so long as they pay that portion of dues related to core representational activities, and because the clause cannot be interpreted without resort to material outside of the CBA, . . . the clause is facially invalid.

(Pet. App. at 12a.)

The court found that "the Board abused its discretion in refusing to order that the clause requiring that employees be 'members of the Union in good standing' either be modified to define that requirement or be removed from the CBA." (Pet. App. at 12a-13a.) "To permit the CBA to say what it cannot literally mean does violence to the Act's policy of voluntary unionism and to principles of contract interpretation." (*Id.* at 10a.)

The Unions' Petition to review this decision should be denied, because the Court of Appeals was clearly correct under this Court's definitive prior interpretations of NLRA section 8(a)(3).

On its face, section 8(a)(3) *appears* to permit unions and employers to negotiate union security clauses which require

employees to acquire and retain "membership" in the union. However, the Court has noted that "[a]fter a statute has been construed . . . by this Court . . . it acquires a meaning that should be as clear as if the judicial gloss had been drafted by the Congress itself." *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 268 (1987) (Stevens, J. concurring and dissenting in part). Thus, section 8(a)(3) of the Act includes the limitations placed on it by this Court.

What limitations has the Court placed on union security clauses authorized by section 8(a)(3) of the NLRA? The Court spent decades "whittling down" these "requirements" and, in the process, dramatically altered the actual meaning and effect of section (8)(a)(3). First, in *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963), the Court held that the maximum obligation that could be forced upon an employee under a union security clause is the payment of "union dues." Notwithstanding the language of section 8(a)(3) purporting to permit a "membership" requirement, the Court held that "'[m]embership' as a condition of employment is whittled down to its financial core." *Id.* at 742; *see also Radio Officers' Union v. NLRB*, 347 U.S. 17, 40-41 (1954) (union security agreements cannot be used "for any purpose other than to compel payment of union dues and fees").

Second, in *Pattern Makers' League v. NLRB*, 473 U.S. 95 (1985), the Court further limited the compulsory unionism provisions of the NLRA by holding that a union member could resign his membership at will because "voluntary unionism" is a core policy of the NLRA. *Id.* at 104-05 ("restrictions on the right to resign [are] inconsistent with the policy of voluntary unionism implicit in § 8(a)(3)"). Most significantly, the Court in *Pattern Makers'* stated foursquare that "[f]ull union membership thus no longer can be a requirement of employment." 473 U.S. at 106.

Finally, in *Communications Workers v. Beck*, 487 U.S. 735 (1988), the Court ruled that the "whittled down" obligation to pay full union dues, as enunciated in *General Motors*, must be "whittled down" even further, so that employees' actual obligation is not the payment of full union dues but merely the payment of a reduced representational fee. *Beck* held that section 8(a)(3)

cannot be interpreted to require employees to pay "the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership." To the contrary, the Court held that, notwithstanding section 8(a)(3)'s explicit language, the statute "authorizes the exaction of only those fees necessary to 'performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues.'" *Beck*, 487 U.S. at 762-63.

Beck reaffirms the conclusion that the NLRA's policy is "voluntary unionism," *id.* at 755; *Pattern Makers'*, 473 U.S. at 104-05, 107, 114. In applying that policy to "union security" provisions negotiated under the Act, the Court found that Congress understood the Act to "provide only the most grudging authorization of such agreements." *Beck*, 487 U.S. at 755. *Beck* conclusively establishes that section 8(a)(3) prohibits a union from requiring, as a condition of employment, "membership" and the forced payment of dues in excess of the cost of representational activities.

In short, the Court's precedents unequivocally hold that employees working under a union security clause need not join a union or even pay full union dues. Rather, at most, they are only obligated to pay a reduced "representation fee." *See General Motors, Pattern Makers'* and *Beck*. Requiring more than the minimal *Beck* payment of a fee is *per se* unlawful. Requiring full union membership—which is precisely what the Paperworkers' agreement requires here—is beyond the pale.

In a similar case, the Eighth Circuit in *Bloom v. NLRB*, 30 F.3d 1001 (1994) found that a nearly identical clause was inherently misleading and unlawful. The Eighth Circuit overturned the Board's refusal to expunge a similar clause, stating:

> Although a union security clause cannot be used as "an instrumentality for the indirect enforcement of nonfinancial union regulations," *Local 54, Hotel Employees & Restaurant Employees Int'l Union (Atlantis Casino Hotel)*, 291 N.L.R.B. 989, 992 (1988), the clause at issue in this case, specifically the "member in

> good standing" language, implies otherwise. An employee who is unfamiliar with the Supreme Court cases discussing union security provisions is likely to conclude that the clause requires exactly what it says —"[membership] in good standing in the Union." We fail to see how an employee can discern from such language that he cannot be terminated if he does not wish to become a formal, full-fledged union member burdened with all of the obligations of union membership and subject to the full reach of the union's disciplinary measures.

Bloom, 30 F.3d at 1004.

Another recent case involving this issue is *Schreier v. Beverly California Corp.*, 892 F. Supp. 225 (D. Minn. 1995). In that case, a district court read *Beck* and *Bloom* to invalidate all union security clauses which overstate the limited representation fee obligation permitted by *Beck*. The clause in *Schreier* did not even require membership, but only required "the payment of a standard initiation fee and standard regular monthly dues, all as applies uniformly to all members of the union in the bargaining unit." The *Schreier* court held that:

> The union security clause is facially invalid under section 8 of the National Labor Relations Act (29 U.S.C. § 158) because it requires more from the plaintiff than can be required under the *Beck* and the *Bloom* cases.
>
> * * *
>
> The union security clause itself is unlawful and has the clear capacity to mislead employees.

892 F. Supp. at 226-27.

In another case involving a challenge to the language of a collective bargaining agreement, the Court of Appeals for the Seventh Circuit stated:

> nothing we have said has been intended to suggest that unions and employers have a privilege to incorporate the language of section 8(a)(3) of the NLRA into their collective bargaining agreements if the consequence is to mislead the employees. This language does not mean what it says, and if its inclusion without appropriate qualification misleads employees, either ***by itself*** or in conjunction with other misleading representations, the union cannot hide behind the fact that it is, after all, the words of Congress that it is repeating.

Wegscheid v. Auto Workers Local 2911, 117 F.3d 986, 991 (7th Cir. 1997) (emphasis added).

Under *ALPA v. O'Neill*, 499 U.S. 65, 79-80 (1991), the legality of the unions' negotiation of its forced membership clause must be weighed against the "legal landscape at the time." Eight years after *Beck*, the "legal landscape" limiting section 8(a)(3) to the payment of only reduced representational fees is clear, as the court of appeals recognized in this case, *Bloom*, and *Wegscheid*. The *Beck* limitations have been effectively written into section 8(a)(3), and it is against that clear "legal landscape" that union security clauses must be judged.

Why do unions put language into collective bargaining agreements that require union membership? As the *Wegscheid* court stated, "the only realistic explanation for the retention of the statutory language in collective bargaining agreements [requiring union membership] . . . is to mislead employees about their right not to join the union." 117 F.3d at 990.

The mere negotiation of the clause in this case is a grotesque violation of the policy of "voluntary unionism" embedded in the Act. *See Pattern Makers'*, 473 U.S. at 107. That policy is negated when a contract affirmatively misleads employees into believing that they will be discharged for failing to become formal union members. Hence, language in a collective bargaining agreement requiring union membership is *per se* facially invalid. Conveying to employees false and fraudulent information about

their union security obligations constitutes a violation of the duty of fair representation and section 8(b)(1)(A).

A collective bargaining agreement controls the employees' obligations vis-a-vis their union and employer under the contract—including their obligations under a union security clause. Words have meaning and the plain language of the union security clause requires that each bargaining unit employee "be a member" of the union. "Membership" language—like that found in the contract here—overstates the limited obligation that employees can be required to undertake under *General Motors* and *Beck*, and misleads employees about the true extent of their obligations. A union security clause that requires union membership is subject to only one interpretation: "join the union, or be fired"! The decision of the U.S. Court of Appeals for the Sixth Circuit was clearly correct, and the Petition for Certiorari should be denied.

II. The Court Should Grant Certiorari on the Issue Petitioners Present, But Not Here. Instead, the Court Should Deny This Petition and Grant the Petition in *Marquez* or, Alternatively, Grant Both the Paperworkers' Petition and the *Marquez* Petition and Summarily Affirm in This Case or Consider the Cases Together.

On December 29, 1997, a petition for certiorari filed by Naomi Marquez was docketed that raises the identical issue presented in this case: "Does a union breach its duty of fair representation when it negotiates and maintains a compulsory unionism provision that, on its face, requires—misleadingly—that an employee be 'a member of the Union' . . . , even though th[at] requirement[] cannot be enforced literally as a condition of employment?" Petition for Certiorari at i, Question I, *Marquez v. Screen Actors Guild*, 66 U.S.L.W. 3458 (U.S. Dec. 24, 1997) (No. 97-1056).

As discussed below, there is, surprisingly in light of *General Motors* and *Beck*, a conflict in the circuits, and the issue in this case is important. However, this is not the best case for the Court

to review. In this case, the collective bargaining agreement simply requires "union membership." In *Marquez*, the agreement requires "union membership" and also defines membership as the payment of full union dues. *Marquez*, 124 F.3d at 1036. The facial validity of union security agreements that require union membership and the payment of full dues thus is presented more completely in *Marquez*. Therefore, the Court should deny certiorari in this case and grant the petition for certiorari in *Marquez*. In the alternative, the Court should grant certiorari in both *Marquez* and this case and summarily affirm in this case or consider them together.

A. There Is a Widespread Conflict Among the Circuits, and Within the NLRB, as to Whether NLRA Section 8(a)(3) Permits Agreements That Purport to Require "Membership" and Payment of Full Dues, Although That Section, as Definitively Interpreted by This Court, Prohibits Enforcement of Those Requirements.

In addition to the Sixth Circuit's decision in this case, four other courts of appeals have faced this issue. The Eighth Circuit was the first to issue an opinion on this question, *Bloom v. NLRB*, 30 F.3d 1001 (1994). In *Bloom*, it reversed a NLRB-approved settlement agreement requiring a union and employer:

> to post notices informing employees that they would "no longer give effect to the provision in [the] contract . . . that requires employees become and remain 'members in good standing' as a condition of continued employment unless such provision also provides that employees need only pay the Union's periodic dues and initiation fees."

Id. at 1002, 1004 (alteration in original).

This notice was "not sufficient to protect [the] employees' . . . right to refrain from union activities," the court ruled, because, under *Beck*, employees "cannot be obligated as a condition of their employment to pay *all* union dues and initiation

fees, as the above notice seems to imply." *Bloom*, 30 F.3d at 1004-05.

Bloom concluded that "an adequate remedy . . . requires expunction of the offending clause" from the collective bargaining agreement. *Id.* at 1005. A district court later recognized that a compulsory unionism clause that does not say that an employee's only obligation is to pay for collective bargaining costs is "facially invalid." *See Schreier v. Beverly Cal. Corp.*, 892 F. Supp. 225, 226-27 (D. Minn. 1995).

Two other circuits, the District of Columbia and the Ninth Circuit, take the opposite position. *See Electronic Workers v. NLRB*, 41 F.3d 1532 (D.C. Cir. 1994)[1] and *Marquez v. Screen Actors Guild*, 124 F.3d 1034 (9th Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3458 (U.S. Dec. 24, 1997) (No. 97-1056). And, there is a conflict on this issue between the decisions of two different panels of a fourth court of appeals, the Seventh Circuit. *Compare Wegscheid v. Auto Workers Local 2911*, 117 F.3d 986 (7th Cir. 1997) *with Nielsen v. Machinists Local 2569*, 94 F.3d 1107 (7th Cir. 1996).

In *Nielsen*, the court "agree[d] with the D.C. Circuit . . . that *Beck* did not, either explicitly or implicitly, call into question the facial validity of union security clauses" that require the payment of union dues without "not[ing] that employees [are] only obligated to pay for core representational activities." 94 F.3d at 1113-15.

Later, in *Wegscheid*, another panel of the Seventh Circuit indicated that it would have reached a result contrary to *Nielsen*

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[1]It is unclear whether the District of Columbia Circuit would take the same position as to compulsory unionism provisions negotiated after *Electronic Workers*. The court there said that the NLRB was "free to reconsider its . . . policy in light of evolving Supreme Court precedent and to conclude that, in the future, unions will be found guilty of a duty-of-fair-representation violation if they adopt 'ambiguous' union-security provisions . . . without apprising employees of their rights under such provisions." 41 F.3d at 1538.

in an appropriate case. *Wegscheid* was an employees' suit alleging that their exclusive bargaining agent breached the duty of fair representation by negotiating and enforcing a compulsory unionism provision that did "not advise the employees of their right (announced in *Beck*) not to join the union and instead to pay only an agency fee." 117 F.3d at 988. The court held that the facial challenge to the provision was "moot," because a settlement of the enforcement count of the complaint gave the plaintiffs "all the relief that *they* need to protect themselves against being misled" by "the objectionable language in the collective bargaining agreement." *Id.* at 990.

This widespread conflict among, and within, the Circuits concerning the facial validity of compulsory unionism provisions requiring full membership and/or payment of full dues is aggravated by a split within the NLRB over the same issue. In *Electronic Workers Local 444 (Paramax Systems Corp.)*, the Board held that a "union-security clause requiring that employees become and remain 'members of the Union in good standing'" was not facially unlawful. 311 N.L.R.B. 1031, 1033 & n.6 (1993), *petition for review denied in pertinent part*, 41 F.3d 1532 (D.C. Cir. 1994).[2] However, later, in *Teamsters Local 443 (Connecticut Limousine Service)*, the Board's current Chairman announced that he "agree[s] with the Sixth Circuit's recent decision in *Buzenius* that union-security clauses containing [language requiring employees to become 'members of the Union in good standing'] are facially invalid." 324 N.L.R.B. No. 105, slip op. at 6 n.1 (Oct. 2, 1997) (Gould, Chairman, dissenting in part) (citation omitted); *accord Monson Trucking, Inc.*, 324 N.L.R.B. No. 149, slip op. at 6 (Oct. 31, 1997) (Gould, Chairman, concurring).

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[2]The Board instead found the clause "ambiguous," and concluded that the unions' "failure to clarify the ambiguity constituted a breach of their duty of fair representation." *Electronic Workers Local 444*, 311 N.L.R.B. at 1033 n.6.

B. The Importance of the Issue.

This question manifestly is important, both in principle and in practice, as this Court previously recognized by granting certiorari in cases such as *Beck*.

It is important in principle, because a requirement that employees join or pay full union dues as a condition of employment impairs employees' rights to refrain from "union membership," rights explicitly guaranteed in section 7 of the National Labor Relations Act, 29 U.S.C. § 157, and a fundamental congressional policy imbedded in the Act.

Whether NLRA section 8(a)(3) permits agreements that say that "membership" and payment of full dues are required, although that section as definitively interpreted by this Court prohibits enforcement of those requirements, is important in practice for two reasons. First, the Court's resolution of this question will affect a large number of such agreements. (*See* Pet. at 5-6.)

Second, this Court's intervention is necessary to establish conclusively nationwide that employers and unions cannot lawfully mislead employees about their obligations in a "union-security" agreement. As NLRB Chairman Gould also has explained, "[g]enerally speaking, neither workers nor employers understand that 'membership' is what the Supreme Court has defined it to be in its 1963 *General Motors* holding." Gould, *supra*, at 3; *see Electronic Workers Local 444*, 311 N.L.R.B. at 1037; Harry H. Wellington, *Union Fines and Workers' Rights*, 85 Yale L.J. 1022, 1057-58 (1976).

C. The Entire Issue of the Validity of Compulsory Unionism Provisions in Collective Bargaining Agreements Is More Completely Presented in *Marquez* Than in This Case.

The *Marquez* case, rather than this case, more concretely presents the entire issue of the facial validity of compulsory

unionism provisions that do not limit the obligations stated to those that can lawfully be enforced as a condition of employment.

The compulsory unionism provision in *this case* only says that employees "'shall become and remain members of the Union in good standing as a condition of employment.'" It does not define "membership in good standing." (Pet. App. at 6a-7a.) Thus, although the Sixth Circuit held that to be valid a "union-security clause" must define its requirement as only that employees "pay that portion of dues related to core representational activities," Pet. App. at 12a, this Court could find that clause facially invalid simply because it requires more than the payment of dues and initiation fees without deciding whether the *Beck* rights must be spelled out in the contract. The latter question cannot be avoided in *Marquez*, because the provision involved there requires every performer ***both*** "to be 'a member of the Union in good standing' ***and*** to pay periodic dues and initiation fees," *Marquez*, 124 F.3d at 1036 (emphasis added).

CONCLUSION

This case presents issues that have great significance to the respective rights of individual employees, unions and employers under the NLRA. There are direct conflicts between the decisions of different courts of appeals on all questions presented, including a widespread conflict among several courts of appeals on the question of the facial validity of compulsory unionism provisions that purport to require employee obligations that cannot lawfully be enforced. However, the decision of the Sixth Circuit in this case is clearly correct under this Court's decisions in *General Motors* and *Beck*. Moreover, the *Marquez* case presents the issue of the validity of compulsory unionism language more completely than does this case. Therefore, the Court should either grant certiorari only in *Marquez*, and deny it or summarily affirm

in this case, or grant certiorari in both cases and consider them together.

Respectfully submitted,

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